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No. 898

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE, THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,
Appellants,

v.

UNITED STATES OF AMERICA

AND

INTERSTATE COMMERCE COMMISSION,
Appellees,

AND

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., PACIFIC INLAND TARIFF BUREAU, INC., ET AL.,
Intervenor-Appellees.

On Appeal from the United States District Court for the District of Columbia

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MOTION OF PACIFIC INLAND TARIFF BUREAU, INC. TO AFFIRM

BRYCE REA, JR.
1329 E Street, N. W.
Washington, D. C.
Counsel for Pacific Inland Tariff Bureau, Inc.,
Intervenor-Appellee

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STATEMENT OF THE CASE

Pacific Inland Tariff Bureau, Inc. (PITB) is the agency through which numerous motor common carriers of prop-

erty, pursuant to an agreement approved by the Interstate Commerce Commission under Section 5a of the Interstate Commerce Act, 49 U.S.C. § 5b, collectively discharge their duty under Section 216(b) of the Interstate Commerce Act, 49 U.S.C. § 316(b), to establish and maintain just and reasonable rates governing, generally speaking, their transportation in the northwestern states of the United States and between those states and California and Arizona. On June 9, 1967, PITB, as agent for its members, published and filed with the Interstate Commerce Commission rate schedules increasing by 5 per cent rates applicable on less-than-truckload shipments, and increasing by 3 per cent rates applicable on truckload shipments, effective July 15, 1967. On July 12, 1967, the Board of Suspension of the Commission, upon protest by Appellants and others, entered an order suspending the operation of the schedules until February 14, 1968, and instituting an investigation of the lawfulness thereof. On July 19, 1967, PITB published and filed supplements to its tariffs, effective August 25, 1967, cancelling the schedules under suspension and investigation. Thereupon, on August 16, 1967, the Board of Suspension entered an order discontinuing the investigation.

On August 7, 1967, PITB published and filed with the Commission new schedules making the same increases of 5 per cent and 3 per cent, effective September 9, 1967. On September 6, 1967, the Board of Suspension, despite protest by the Appellants and others, declined to suspend or investigate the increases. On September 8, 1967, Division 2 of the Commission, upon appeal by Appellants, entered an order instituting an investigation of the lawfulness of the increases. However, it did not suspend their operation and they became effective September 9, 1967.

Thereafter Appellants asked the United States District Court for the District of Columbia to declare the increases in rates effective September 9, 1967, unlawful, the theory

being that the order of suspension of July 12, 1967, was outstanding and valid and that the increases were filed in violation of the Commission's Rules of Practice. On July 22, 1968, the Court dismissed the complaint on the grounds that Appellants had failed to exhaust the statutory remedies afforded them, and that no final agency action subject to judicial review was obtained by Appellants before they sought to invoke the jurisdiction of the Court. *National Industrial Traffic League* v. *United States*, 287 F. Supp. 129 (D. D.C. 1968).

ARGUMENT

Appellants in this appeal pose five questions that they contend are sufficiently substantial to warrant plenary review by this Court. First, they asked whether the suspension provisions of 49 U.S.C. § 316(g) precludes carriers who elect not to defend and, therefore, cancel the suspended rates from republishing the same rates during the period within which the cancelled rates would have been under suspension. The plain answer is no. Appellants do not deny that carriers may choose to cancel rates under investigation and suspension rather than defend them. This is the choice the carriers made here. Having made that choice, there were no schedules on file with the Commission to which its order of investigation and suspension could apply. Hence, the Board of Suspension, under authority delegated to it by Section 7.3 of the Commission's Organization Minutes (Appellants' Jurisdictional Statement, App. F) dismissed the proceedings instituted by that order. The effect of the dismissal was to wipe the slate clean and leave the carriers free to publish and file at any time such new rates as they considered proper—whether higher than, lower than, or the same as, the rates cancelled. To hold otherwise would be to foreclose the carriers from discharging their continuing duty under Section 216(b) of the Interstate Commerce Act to establish and maintain just and reasonable rates.

Appellants next asked whether an Order of the Board of Suspension for continuing an investigation of the lawfulness of rates which have been cancelled can terminate the suspension of the use of the rates. The plain answer is yes. The Commission's authority to issue an order of suspension is clearly ancillary to its authority to enter upon an investigation of the lawfulness of rates. If no investigation is instituted there can be no suspension. So too, if an investigation be terminated, a suspension previously ordered must fall. This would be true in a case in which the Commission terminated an investigation of rates that had not been cancelled, which it may do. (See *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294 (1963); *Eastern Air Lines* v. *Civil Aeronautics Board*, 294 F. 2d 235 (D.C. Cir. 1961)). *A fortiori*, it is true in this case, in which the investigation was terminated because the cancellation of the rates at issue therein rendered it moot. The fact that the order of termination was issued by the Board of Suspension rather than the Commission itself makes no difference when, as in the case here, the Board has authority to issue the order.

Appellants' third, fourth and fifth questions all rest on the premise that there was an outstanding order of suspension which the Commission disregarded and which the District Court had jurisdiction to enforce. As we have seen, that premise is false. Furthermore, the period of suspension has long since passed, and it is settled that no court has jurisdiction to review the Commission's determination to suspend or not, or to extend the period of suspension beyond the period fixed by the Commission. *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963).

As for the argument that the Commission disregarded its Rules of Practice, which rests on Section 200 of those rules (49 C.F.R. § 1100.200), which permits carriers to seek reconsideration by the Commission of orders of suspension issued by the Board of Suspension, we may assume *arguendo* that Section 200 provides the only meth-

od by which the carriers could have achieved the lifting of the suspension and thereby made the filed and published rates effective. But the carriers did not seek to make the filed and published rates effective. Rather, they chose to exercise their right to cancel the rates and start anew.[1]

When the carriers started anew by filing new schedules to be effective September 9, 1967, fifty-five days later than the originally scheduled date of July 15, 1967, Appellants had and exercised their right to seek investigation and suspension. Upon their protest the Commission ordered an investigation,[2] but decided not to exercise its ancillary power to suspend. In sum, looking at substance rather than form, Appellants are asking the judiciary to reverse that decision. This, no court can do. *Arrow Transportation Co., supra.*

WHEREFORE, Pacific Inland Tariff Bureau, Inc. prays this Court to summarily affirm the judgment of the District Court.

Respectfully submitted,

BRYCE REA, JR.
1329 E Street, N. W.
Washington, D. C. 20004
Counsel for Pacific Inland Tariff Bureau, Inc.,
Intervenor-Appellee

Of Counsel:

REA, GROSS & KNEBEL
917 Munsey Building
1329 E Street, N. W.
Washington, D. C. 20004

[1] The carriers chose this course in order to give themselves time to prepare and submit a better explanation of and justification for increased rates than they had earlier submitted.

[2] Appellants participated in the hearings on the investigation, which is now pending for decision.